Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

STATE OF NEW YORK,

Petitioner,

v.

ROBERT B. REICH, Secretary of the United States Department of Labor,

Respondent.

THOMAS A. CONSTANTINE, As Superintendent of the Division of the New York State Police; DIVISION OF THE NEW YORK STATE POLICE; STATE OF NEW YORK,

Petitioner,

v.

GERALD J. LONG, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF STATES OF CALIFORNIA, ALASKA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, RHODE ISLAND, SOUTH CAROLINA, UTAH, VIRGINIA AND WASHINGTON IN SUPPORT OF PETITION FOR CERTIORARI

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STATEMENT OF INTEREST OF AMICUS STATES

The states represented herein share more than an abstract interest in the issues presented by New York. They share grave budgetary concerns caused in no small part by increasingly heavy federal mandates. Many of them have incurred fiscal deficits in recent years, and face new ones in 1994. They are attempting to confront increasing demands on their police, judicial, prosecutorial and correctional facilities imposed by growing crime rates and a corresponding burden on criminal justice systems. And many of them are inhibited in responding to these demands by state constitutional limits on spending.

An increasing number of these legal, social and political problems are arising from the inevitable tensions caused by these competing demands. States must have the freedom to structure their governmental functions in order to meet these diverse challenges.

SUMMARY OF THE ARGUMENT

Rigid application of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (FLSA), to states and their subdivisions is causing increasing problems in this period of budget crisis and recessionary pressures. Federal mandates are placing state governments in an increasingly impossible position by depriving them of the flexibility they need to cope with shortfall deficits, and to comply with constitutional spending limits.

The inevitable effect of unbending adherence to standards designed for the private sector is to require restructuring of state governmental programs, thus effectively commandeering their legislative processes. The Tenth Amendment prohibits such a practice.

INTRODUCTION

As this Court has observed, its jurisprudence in application of the Tenth Amendment to state governmental functions has "travelled an unsteady path." *New York v. United States*, ___ U.S. ___, 112 S.Ct. 2408, 2420 (1992). This case provides a much-needed opportunity to provide certainty and stability in a field which otherwise will be the subject of increasing litigation as the irresistible force of federal mandates meet the immutable limits of state resources and the constraints of state constitutions.

Giving meaning to the Tenth Amendment has been no easy task. As this Court has accurately observed, the federal government undertakes activities today "that would have been unimaginable to the Framers . . . " *New York v. U.S.*, 112 S.Ct. 2408, 2418 (1992). Yet the constitutional powers of Congress were phrased broadly enough to allow for such expansion. *Ibid.* The ability of Congress to legislate in areas traditionally regulated by the states is indeed ". . . an extraordinary power in a federalist system." *Gregory v. Ashcroft*, ___ U.S. ___, 111 S.Ct. 2395, 2400 (1991).

For many years, the states were assured by this Court of protection from undue interference with their "freedom to structure integral operations in areas of traditional governmental functions," *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). It was generally assumed that Congress lacked the power to "impair the States' integrity or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547, n. 7 (1975); e.g., *Coyle v. Oklahoma*, 221 U.S. 559 (1911). This sense of security came to an abrupt end nine years ago. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the court tilted the scales in favor of a construction of the Commerce Clause giving the federal government virtually plenary power over state governmental activities.

Since then, this Court has shown a willingness to consider some of the problems caused by *Garcia's* expansive reach and to revisit the founders' intent to create a "compound republic," in which "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist, No. 51, p. 323 (J. Madison), No. 45 pp. 292-293 (C. Rossiter Ed. 1961) (J. Madison), cited in *Gregory v. Ashcroft, supra*, 111 S.Ct. at 2399-2400.

In *New York v. Reich*, the Court is asked to revisit the applicability of federal wage and hour requirements to states – this time to their criminal investigators. But the issues arising from slavish application of the federal mandates to states' criminal justice functions go much further. They have extended to require overtime for state patrol

cadets for attending classes at their academy, and virtually prohibit suspensions of state-employed administrative personnel for less than one week. Necessarily implicated in this issue is the ability of a state to structure its policy of law enforcement, and to maintain law and order. Few functions are more "integral" to the traditional functions of a state. Cf. *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264 (1981).

ARGUMENT

I

THE EMERGENCE OF MULTIPLE TENTH AMENDMENT ISSUES MAKES RECONSIDERATION OF *GARCIA* IMPERATIVE

New York v. Reich is the forerunner, not the culmination, of serious constitutional questions en route to this Court for needed resolution. Numerous other states face similar problems as they attempt to allocate dwindling resources to ever-increasing needs. Close on the heels of *Reich* are issues involving whether states must pay their employees even when their constitutions prohibit payment in the absence of a validly-enacted state budget, *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993), petition for cert. filed, No. 93-772, and whether states may pay by registered warrants when no funds have been appropriated. *Parr v. State of California*, U.S.D.C., E.D. Cal. No. CIV-S-92-GE (Sept. 29, 1993). And in *Shepherd v. State of California*, E.D. Cal. No. S-90-0221-LFK, the issue of overtime policy for rural firefighters is presently being

contested.[1] Federal mandates of this kind have run at last into the prohibition against forcing states to enact statutes. They violate the principles set forth so eloquently in the recent opinions of this Court.

II

THE TENTH AMENDMENT PROHIBITS CONGRESS FROM SUBSTITUTING ITS JUDGMENT FOR THAT OF STATES IN ADMINISTERING STATE CRIMINAL JUSTICE SYSTEMS

Few areas have been subject to as much consideration and reconsideration as has the applicability of the Fair Labor Standards Act to state governmental systems. Unfortunately, the interplay of congressional mandates under the Commerce Clause with state sovereignty has

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[1] In California alone a swarm of cases are awaiting disposition in the federal courts or have recently been settled in light of rulings that *Garcia* controls. They include: *California Correctional Peace Officer Assn. v. State,* CIV-S-91-476-LKK (state parole agents); *California Union of Safety Employees v. State,* CIV-S-90-0167-LKK; *California Dept. of Forestry Employees Assn. v. State,* CIV-S-90-0221-LKK (battalion chiefs and other supervisory fire positions); *California Assn. of Professional Scientists v. State,* CIV-S-91-479-LKK (scientists working for state agencies); *Lomath v. State,* CIV-S-92-1690 (correctional sergeants and lieutenants in State Department of Corrections and Youth Authority); *Rafferty v. State,* CIV-S-92-177-DFL; *Dowling v. State,* CIV-S-90-0866. In addition, the State faces a number of lawsuits filed by prison inmates claiming the minimum wage for work performed during incarceration. We are also informed that 25-30 local governments in California are embroiled in similar litigation.

been the subject of decisions ruled as much by philosophy as by facts and controlling principles. Cf. Rotunda & Novak, 1 *Treatise on Constitutional Law* § 4.10, n. 33, p. 419 (West Pub. Co. 1992). Yet underlying even the most negative of decisions is the understanding that Congress could, if uninhibited by the Tenth Amendment, engage in "the utter destruction of the state as a sovereign political entity." *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968); see also, *Employees of Dept. of Public Health & Welfare v. Missouri*, 411 U.S. 279 (1973).

For ten years, applicability of federal statutory mandates to the states was tested by three factors: (1) whether the regulation was applied to "States as States," (2) whether it affected "matters that are indisputably attributes of state sovereignty," and (3) whether the impact of compliance would directly impair states' ability "to structure integral operations in areas of traditional functions," thus affecting "matters essential to states' separate and independent existence." *National League of Cities v. Usery*, 426 U.S. 8323 (1976); see *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264 (1981), at 286-287. Underlying this tripartite test was the possibility that even if those standards were met, the "nature of the federal interest advanced may be such that it justifies state submission." *Hodel, supra*, 452 U.S. at 288, n. 29; *New York v. U.S., supra*, 112 S.Ct. at 2429.

One scholar characterized the *Usery* analysis this way: if the federal mandate was: "You pay the piper, but we'll call the tunes," the Tenth Amendment was violated. Rotunda & Novak, *supra*, § 4.10, p. 437, n. 82.

This test was successfully applied in a number of instances. Although the states' power to set wages in order to carry out their governmental functions was generally assumed to be "an undoubted attribute of state sovereignty," *Usery, supra,* 426 U.S. at 845, by no means were all exercises of commerce power invalidated. Thus the Court held that the states' interests in maintaining a blanket policy of discharging fish and game employees at age 55 did not arise to "integral operations in areas of traditional governmental functions" so as to justify exemption from the Age Discrimination Act. *Equal Employment Opportunity Commission v. Wyoming,* 460 U.S. 226 (1983). Nor did the operation of a state-owned railway constitute such a traditional function so as to excuse it from the requirements of the Railway Labor Act. *United Transportation Union v. Long Island, R.R. Co.,* 455 U.S. 678 (1982). Emergency wage freezes, adopted to meet a threat to the national economy were upheld. *Fry v. United States,* 421 U.S. 542 (1975). And merely requiring states to *consider* preferred federal standards was permissible, so long as they were not required to *adopt* them. *FERC v. Mississippi,* 456 U.S. 742 (1982), reh. denied, 458 U.S. 1131 (1982). None of those cases involved regulations with the potential to "overwhelm state fiscal policy." *Maryland v. Wirtz,* 321 U.S. 183, 203 (1968) (Douglas, J., dissenting).

The decade of *Usery,* however, soon came to an end, overruled in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985). *Garcia* purports to characterize the rule in a different way: Congress may choose the tune *and* the states must pay the piper. Any disputes over this must be resolved in Congress, and not before the Court. The unworkability of this concept is apparent.

Even in *Maryland v. Wirtz*, this Court assumed that it had "ample power to prevent . . . the utter destruction of the State as a sovereign political entity." *Id.*, 392 U.S. at 196. *Garcia* makes no such promises.

The *Garcia* decision makes the assumption that state sovereign interests are protected because the decisions of Congress are "decisions of the States themselves," through their elected representatives. *National League of Cities v. Usery, supra*, 426 U.S. at 841-842, n. 12. This assumption is untenable, not only in light of this Court's analogy to its separation of powers decisions (in which acts are held unconstitutional notwithstanding the chief executive's approval), *New York v. U.S., supra*, 112 S.Ct. at 2431-2432, but also in the context of the Bill of Rights in general. Members of Congress are elected by the people, although they represent states. If the only protection of states is to come from their elected federal representatives, why not conclude that Congress is similarly the only forum for protection against uncompensated takings of property or unlawful searches? *State* government, not Congress, bears the responsibility to represent and be accountable to its citizens. *New York v. U.S., supra*, 112 S.Ct. at 2429.

III

APPLICATION OF THE REGULATIONS IN QUESTION WILL EFFECTIVELY COMMANDEER THE LEGISLATIVE PROCESSES OF THE STATES

Ostensibly, the Fair Labor Standards Act subjects states to "the same legislation applicable to private parties." *New York v. U.S., supra*, 112 S.Ct. at 2520. However

as applied, its mandates will force states to "enact and enforce a federal regulatory program." *Id.* at 2420, quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981). As this Court observed in *New York*, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. U.S., supra*, 112 S.Ct. at 2420. "[N]either government may destroy the other nor curtail in any substantial manner the exercise of its powers." *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926).

In *New York v. U.S.*, Congress presented the states with a constitutionally unacceptable choice: either regulate according to our instructions or accept title to radioactive waste. *Id.*, 112 S.Ct. at 2428. As in the case before us, the State "may not decline to administer the federal program." *Id.* 112 S.Ct. at 2429. Insofar as the requirements of the federal act at issue here displace states' flexibility in administering their criminal justice system, they impede the states' responsibility "to represent and be accountable to (their) citizens." *Ibid.*

Only three years ago, this Court noted that a serious issue would arise if the FLSA were construed to apply to state constitutional processes establishing the qualifications of their officers: "It is obviously essential to the independence of the States, and to their peace and tranquillity, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." *Gregory v. Ashcroft, supra*, 111 S.Ct. at 2400-2401, quoting *Taylor v. Beckham*, 178 U.S. 548, 570-571 (1900). Bearing that principle in

mind, the Court held that the clearest intent of Congress would be required before the Act would be construed to apply to state court judges.

It was far from the founders' intent that Congress would take it upon itself to require a reallocation of state resources amounting to forced reorganization. Cf. The Federalist No. 17 at 68 (Alexander Hamilton), stating that any attempt to regulate the local police "would be as troublesome as it is nugatory." *Gregory v. Ashcroft* expressly recognized the authority of the people of a state "to determine the qualifications of their most important government officials." *Id.*, 111 S.Ct. at 2402. While the equal application of uniform hours and wages under the Commerce Clause to janitors employed in the statehouse as well as to those in an office building down the street arguably might present a different situation, cf. *National League of Cities v. Usery, supra,* 426 U.S. at 880 (Justice Stevens, dissenting), such an issue could be resolved by balancing the federal interest in such regulations against the state program involved, *id.* at 856 (concurring opinion of Blackmun, J.), not by declining to consider the entire issue.

If the power of Congress under the Commerce Clause were, as *Garcia* suggests, limited primarily by the political process, *Gregory v. Ashcroft, supra,* 111 S.Ct. at 2403, there would be few limits on its ability to restructure state governments. What would prevent an amendment to the FLSA requiring that the pay of state administrators be scaled on the extent of their compliance with specified federal acts? Could the wages and hours of state law enforcement officers be determined by the amount of

time spent in investigating interstate crimes? Could Congress require states "to quadruple their police forces in order to prevent commerce-crippling riots?" *Maryland v. Wirtz, supra,* 392 U.S. at 204-205 (Douglas, J. dissenting). Could Congress require bonuses to state policemen for time spent in assisting in RICO prosecutions?

Moving beyond the FLSA context, what would prevent the Congress from requiring states to administer federal wetlands laws and compensate the individuals subject to regulatory takings? Cf. S. Prakash, "Field Office Federalism," 79 Virginia L. Rev. 1957 (1993). In short, as Justice Douglas put it, could Congress "totally draw up each State's budget to avoid 'disruptive effect(s) . . . on commercial intercourse'?" *Ibid.*, quoting *Atlanta Motel v. United States,* 379 U.S. 241, 257.

Although this Court has repeatedly disapproved efforts to commandeer the state legislative process, full application of the *Garcia* principle here can have no other effect. As one federal judge observed, legislatures could be forced to (1) increase taxes even where state constitutions prohibit it, (2) curtail the nature and extent of essential services, (3) reduce indispensable services in other governmental programs in order to meet the budgets for those activities forced on them by the United States, and refrain from entering new fields of governmental activity necessitated by changing social conditions. *Maryland v. Wirtz,* 269 F.Supp. 826, 853 (D. Md. 1967) (dissenting opinion), quoted in *Maryland v. Wirtz,* 392 U.S. at 202-203 (Douglas, J. dissenting). The role of the states as laboratories for social and economic experiment will be limited indeed under this heavy-handed

federal regime. Cf. *New York State Ice Co. v. Liebmann*, 285 U.S. 260, 311 (1931) (Brandeis, J., dissenting).

The present state of Tenth Amendment jurisprudence is particularly unsatisfying. Unlike other provisions of the Bill of Rights, the Tenth Amendment lingers over the federal system like the smile of the Cheshire cat in Alice in Wonderland. It receives lip service, but is largely unenforceable in the courts. While sovereign states have vague assurances of some unspecified limit on the powers of Congress over the states, *Garcia, supra*, 469 U.S. at 556, the post-*Garcia* decisions have set few guideposts. We know that Congress may not "commandeer state legislative processes." But may it, as a practical effect, compel the effects of those processes by commandeering the states' budget process and redirecting the allocation of scarce resources?

What is left of the Tenth Amendment, then, can be easily circumvented. We believe that *Coyle v. Oklahoma, supra*, remains in effect and thus state capitols may not be changed by congressional mandate. But could Congress, acting through fair labor standards legislation, influence their location by requiring different pay scales for state employees in one city as opposed to another?

It has been suggested that the rule of construction set forth in *Gregory v. Ashcroft*, in its recognition of the importance of federalism, contravenes *Garcia v. San Antonio Metropolitan Transit Authority, supra*, and *South Carolina v. Baker*, 108 S.Ct. 2837 (1988), by treating states differently from private entities. *Gregory v. Ashcroft, supra*, 111 S.Ct. at 2410 (dissenting opinion of Justice White). But that is precisely what the Tenth Amendment was written

to do. If Congress were to have complete authority over states under the Commerce Clause, James Madison would have been guilty of election fraud in referring to the "compound republic of America," in which "the power surrendered by the people is . . . divided between two distinct governments." The Federalist No. 51, p. 323, quoted in *Gregory v. Ashcroft, supra,* 111 S.Ct. at 2400.

A provision that so drastically mandates a reallocation of state criminal enforcement resources amounts to coercion, not encouragement. It amounts to commandeering the legislative processes of States by compelling drastic reallocation of resources and restructuring of police functions. Cf. *New York v. U.S.,* 112 S.Ct. 2408 (1992). It permits the federal government to do indirectly what this Court has prohibited it from doing directly.

The time has come to reexamine the underlying rationale of *Garcia's* revisionist Tenth Amendment rule. It is more constitutionally significant that a federal act impairs the functioning of states as states, than whether the legislation is equally applicable to private parties. Cf. *National League of Cities v. Usery, supra,* with *New York v. U.S., supra,* 112 S.Ct. at 2441, 2443 (Justice White, concurring and dissenting in part). As this Court has more recently and aptly observed, "State governments are neither regional offices nor administrative agencies of the Federal Government." *New York v. U.S.,* 112 S.Ct. 2408, 2434 (1992).

IV

THE ADMINISTRATIVE EXCEPTION IN THE FLSA IS APPLICABLE HERE

Inexplicably, the Department of Labor here has reversed prior decisions concerning the applicability of the FLSA to state criminal investigators. Petitioner's Brief for Certiorari at 14-16. As petitioners point out, both the Court of Claims and the Eighth Circuit have upheld the administratively construed exemption of postal inspectors. *Id.* at 14 citing *Sprague v. U.S.*, 677 F.2d 865 (Ct.Cl. 1982); *Dymond v. U.S. Postal Service*, 670 F.2d 93 (8th Cir. 1982). We have been informed that the Department of Labor has changed its position several times, classifying Rhode Island State Police and Nevada State investigators as exempt, then not exempt[2], and similarly changing its construction of the adminstrative exemption to Washington State's community corrections officers, at a cost of over one million dollars in back overtime. It is noteworthy that the investigators of the Labor Department itself have been exempted. *Id.* at 13. The absence of established and principled administrative construction only gives further credence to the mandates of *Gregory v. Ashcroft, supra,* that a showing of absolute certainty be made

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[2] The ultimate determination that special agents of the California Department of Justice fell within overtime requirements of the Act resulted in an eventual settlement of $4 million. *Nadeau v. Office of the Attorney General,* CIV-S-89-0032-LKK. An allied case involving investigators of the California Department of Forestry and Fire Protection resulted in a cost of $1.5 million to the state. *Alex v. State of California,* CIV-S-89-0032-LKK.

before it is concluded that Congress intended to apply the Act to State officers or employees. *Id.*, 111 S.Ct. at 2403.

State criminal investigators fit securely within the rules of statutory interpretation set forth in *Gregory*. While the FLSA's exemption for "administrative and professional" employees is "an odd way for Congress to exclude (them)," *Id.*, 111 S.Ct. Rptr. at 2424, the statute does not make it clear, as it must, that Congress meant the Act to cover them.

CONCLUSION

The Court's task is not an easy one. But in its recent opinions, it has shown a recognition of the need for solution. As federal mandates increase and state treasuries diminish, the inevitable conflict is one which must be resolved by the Court. The *Garcia* rule inevitably permits the national government to "devour the essentials of state sovereignty." *Maryland v. Wirtz, supra,* 392 U.S. at 205 (Douglas, J. dissenting). By revisiting the balanced and well-tried considerations in *Usery*, its predecessors and its progeny, the Court can give effect to the Tenth Amendment's provisions, "not to create a sacred province of state autonomy but to ensure that the unique benefits of a federal system . . . not be lost through undue federal interference with certain core state functions." *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983). There is a pressing need for application of the principle that, as this Court

observed in *New York v. U.S.*, 112 S.Ct. at 2434, "States are not mere political subdivisions of the United States."

Respectfully submitted,

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